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No. 01-573

In the Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, ET AL.
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in determining, at this interlocutory stage, that the Tenth Amendment does not preclude this enforcement action brought by the federal respondent pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is unpublished, but the decision is noted at 2001 WL 897433 (Table). The orders of the district court (Pet. App. 22a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2001. The petition for a writ of certiorari was filed on October 2, 2001. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(1), makes it "unlawful

for an employer * * * [to] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." "The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. 630(*l*). "[E]mployer" expressly includes "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b). As amended by the Older Workers Benefit Protection Act of 1990 (OWBPA), 29 U.S.C. 623(f)(2)(B)(i), the ADEA permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker."

2. Respondent Equal Employment Opportunity Commission (EEOC) filed this action pursuant to the ADEA against petitioners Kentucky Retirement System (KRS), Commonwealth of Kentucky, and Jefferson County Sheriff's Office, claiming that petitioners maintain a disability and retirement program that denies or reduces benefits to individuals on the basis of age. The action arose from a discrimination charge filed by Charles Lickteig. Lickteig was employed in a "hazardous duty" position by the Jefferson County Sheriff's Department, a participant in the County Employees Retirement System operated by KRS. When Lickteig became unable to work due to disability, he applied to KRS for disability retirement benefits. KRS notified Lickteig that under Kentucky law, he was ineligible for disability retirement benefits because of his age.

Lickteig filed a charge with the EEOC, alleging discrimination in violation of the ADEA. Pet. App. 4a n.2.

After conducting an investigation and attempting to resolve Lickteig's discrimination charge, see 29 U.S.C. 626(b), respondent filed this ADEA enforcement action on behalf of Lickteig and a class of similarly situated individuals in the United States District Court for the Western District of Kentucky. Pet. App. 2a. The complaint alleges that the disability retirement program operated by KRS discriminates against individuals age 40 or older in violation of the ADEA in several ways, including by denying disability retirement benefits to individuals over age 55 in hazardous positions, see Ky. Rev. Stat. Ann. § 16.582(2)(b) (Michie 1996); denying such benefits to individuals over age 65 in non-hazardous positions, see *id.* § 61.600(1)(b); and paying lower disability retirement benefits to older workers with the same earnings and years of service as younger workers, solely because of the age of such workers on the date they become disabled, see *id.* § 61.605.

To remedy those alleged violations of the ADEA, respondent's complaint sought injunctive relief enjoining petitioners from engaging in unlawful employment discrimination based on age, and requiring petitioners to institute policies and practices providing equal opportunities for individuals age 40 and older, and redressing the continuing effects of unlawful employment practices. The complaint requested monetary relief to make whole Lickteig and similarly situated employees who were denied benefits or received lower benefits because of their age, in violation of the ADEA. Pet. App. 3a-4a. In addition, the complaint "specifically requests that the district court '[o]rder Defendant Commonwealth to enact permanent legislation provid-

ing that KRS disability benefits will be granted and calculated without regard to age.'" *Id.* at 20a.

3. The district court denied petitioners' motions to dismiss the complaint on the ground that they are entitled to complete immunity from suit under Tenth Amendment and Eleventh Amendment principles. Pet. App. 22a-32a. In considering petitioners' claim of immunity under the Eleventh Amendment, the court rejected petitioners' reliance on *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), reasoning that "*Kimel* stands only for the proposition that *private individuals* may not bring ADEA suits against their state employers." Pet. App. 25a (emphasis added). While "[t]he Eleventh Amendment confirms that each state is a sovereign entity, not subject to private suits without its consent," the court explained, "[s]tates are not * * * immune from suits brought by the federal government to enforce state compliance with federal laws." *Ibid.* Because this suit was "brought by the EEOC, not by private individuals," the court concluded that the suit is not barred by the Eleventh Amendment principles discussed in *Kimel*. *Ibid.*

The district court also rejected petitioners' claim that respondent's action was barred under the Tenth Amendment. Pet. App. 27a-29a. The court considered that claim under the principles developed in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *South Carolina* v. *Baker*, 485 U.S. 505 (1988); and *New York* v. *United States*, 505 U.S. 144 (1992), for determining whether legislation enacted pursuant to Congress's commerce power contravenes the Tenth Amendment. See Pet. App. 27a-28a. The court emphasized that the ADEA does not require States to enact retirement systems for state employees, but, as respondent has maintained in this case, requires "only

that, if such a system exists, the benefits should be awarded without regard to age." *Id.* at 29a. The court further determined that, in requiring state employers to comply with the ADEA, "[t]he State's discretion to achieve its goals in the way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard." *Ibid.* (quoting *EEOC* v. *Wyoming*, 460 U.S. 226, 240 (1983)).

4. The court of appeals in an unpublished opinion affirmed in part and reversed in part, and remanded for further proceedings. Pet. App. 1a-21a. The court affirmed the district court's ruling that "to the extent that the EEOC seeks [petitioners'] compliance with the ADEA, as well as relief on behalf of Charles Lickteig and those similarly situated for ADEA violations, [petitioners] are not entitled to immunity on either Tenth or Eleventh Amendment grounds." *Id.* at 21a. The court rejected petitioners' Eleventh Amendment immunity claim largely for the same reasons given by the district court, including "that *Kimel* expressly limited the nature of its holding" to comport with the "well-established principle" that Eleventh Amendment "immunity does not insulate a state from an enforcement action brought by the federal government." *Id.* at 10a.

In considering petitioners' Tenth Amendment claim, the court of appeals observed that in *EEOC* v. *Wyoming*, *supra*, this Court held that, as applied to state and local governments, "the ADEA did not violate state sovereignty under the Tenth Amendment," as understood in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Pet. App. 14a. The court of appeals rejected petitioners' argument that *Garcia* called into doubt the result in *Wyoming*, explaining that "*Garcia* established

a far less stringent standard than that articulated in *National League of Cities* to determine whether federal legislation under the Commerce Clause impairs state sovereignty under the Tenth Amendment." *Id.* at 15a. Thus, the court of appeals reasoned, "*Garcia* merely reinforced the Court's determination in *Wyoming* that Congress is constitutionally authorized to require state employers to abide by the ADEA." *Ibid.*

The court of appeals also evaluated petitioners' Tenth Amendment claim in light of this Court's subsequent decisions in *South Carolina* v. *Baker*, *supra*; *New York* v. *United States*, *supra*; *Printz* v. *United States*, 521 U.S. 898 (1997); and *Reno* v. *Condon*, 528 U.S. 141 (2000), and held that that claim lacked merit in all but one respect. With respect to the specific request in Section D of the complaint's prayer for relief for an order directing the State "to enact permanent legislation providing that KRS disability benefits will be granted and calculated without regard to age," the court concluded that "the EEOC cannot direct the Commonwealth 'to enact permanent legislation,' insofar as forcing the Commonwealth to do so would violate the Tenth Amendment." *Id.* at 20a. The court reversed the district court's denial of sovereign immunity in that particular respect, and remanded the case for further proceedings consistent with its decision. *Id.* at 21a.

ARGUMENT

Petitioners challenge the court of appeals' unpublished decision only insofar as it rejects their Tenth Amendment claim. That ruling does not conflict with any decision of this Court. Indeed, in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), this Court rejected a similar Tenth Amendment challenge to the ADEA in the light of the then-governing, more sensitive Tenth

Amendment analysis established by *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). It follows *a fortiorari* that the ADEA satisfies the less rigorous standard adopted in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Petitioners do not allege any circuit conflict, nor could the unpublished decision below contribute to any such conflict. In addition, petitioners' Tenth Amendment claim is particularly ill-suited for review in its current interlocutory posture.

1. The court of appeals correctly held that the Tenth Amendment does not categorically bar respondent's action "to the extent that the EEOC seeks [petitioners'] compliance with the ADEA, as well as relief on behalf of Charles Lickteig and those similarly situated for ADEA violations." Pet. App. 21a. In *Wyoming*, 460 U.S. at 243, this Court held that Congress properly exercised its commerce authority in extending the ADEA to protect state employees from unlawful age discrimination, and that requiring state employers to comply with the ADEA does not unduly intrude upon state sovereignty under the Tenth Amendment. In *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), the Court recently reaffirmed that ruling. See *id.* at 78 ("In [*Wyoming*], we held that the ADEA constitutes a valid exercise of Congress' power '[t]o regulate Commerce . . . among the several States,' Art. I, § 8, cl. 3, and that the Act did not transgress any external restraints imposed on the commerce power by the Tenth Amendment.").

In a footnote, petitioners acknowledge "this Court's ruling in [*Wyoming*] upholding the enactment of the ADEA * * * and its reaffirmation of that ruling in [*Kimel*]." Pet. 14 n.4. Nevertheless, petitioners maintain that "[s]uch precedent is not dispositive" of their

argument that Congress cannot constitutionally require a state employer to observe the ADEA's basic mandate that both public and private employers refrain from unlawful age discrimination in providing retirement benefits to their employees. *Ibid.* Petitioners' argument that state employers are uniquely immune from federal regulation pursuant to the ADEA misconstrues this Court's Tenth Amendment jurisprudence, and was properly rejected by the courts below.

In *National League of Cities*, this Court held that the extension of the FLSA's wage and hour requirements to state and local government employers engaged in traditional governmental functions violated principles of state sovereignty under the Tenth Amendment. 426 U.S. at 852. Following that decision, the State of Wyoming challenged on Tenth Amendment grounds the application of the ADEA to state employers, "at least insofar as it regulated Wyoming's employment relationship with its game wardens and other law enforcement officials." *Wyoming*, 460 U.S. at 235. The Court recognized that "[t]he management of state parks is clearly a traditional state function," but concluded that "the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities* so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States." *Id.* at 239.

In applying the ADEA to Wyoming's mandatory retirement law, the Court explained that "the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard." *Wyoming*, 460 U.S. at 240. The Court contrasted the "wide-ranging and profound threat to the structure of state governance" that the *National League of Cities*

Court identified in requiring States to comply with the FLSA, *ibid.*, with the comparatively "minimal character of the federal intrusion" imposed on Wyoming's sovereign interests by the ADEA. *Id.* at 241-242 & n.17. Thus, even measured under the standard adopted in *National League of Cities*, the Court concluded that "[t]he extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress' powers under the Commerce Clause," and was not proscribed by the Tenth Amendment. *Id.* at 243.[1]

Contrary to petitioners' suggestion (Pet. 14 n.4), in *Wyoming* the Court considered and rejected the State's argument that "eliminating mandatory retirement * * * would require the complete restructuring of the benefit program" for state employees, 460 U.S. at 241 n.15 (internal quotation marks omitted), and that application of the ADEA thus violated Wyoming's sovereign interest in "maintaining the integrity of the state pension system." *Id.* at 239 n.13. While the Court acknowledged that "the costs of certain state health and other benefit plans would increase if they were automatically extended to older workers now forced to retire at an early age," it pointed out that Congress had mitigated this economic burden on employers by including in the ADEA "a provision specifically disclaiming a construction of the Act which would require that

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[1] Following *Wyoming*, Congress amended the ADEA in 1986 to exempt from the general prohibition against age discrimination mandatory age limits for firefighters or law enforcement officers "in effect under applicable State or local law on March 3, 1983," the date *Wyoming* was decided. See 29 U.S.C. 623(j) (Supp. V 1999). As originally enacted, the exemption was temporary and expired in 1993. But Congress reenacted the provision as a permanent exemption in 1996, retroactive to the 1993 expiration date.

the health and similar benefits received by older workers be in all respects identical to those received by younger workers." *Id.* at 241-242 (citing 29 U.S.C. 623(f)(2)).[2]

Two years after *Wyoming*, the Court in *Garcia* v. *San Antonio Metropolitan Transit Authority*, *supra*, overruled *National League of Cities*, and held that extension of the FLSA's overtime and minimum wage requirements to cover state and local government employees "contravened no affirmative limit" imposed by the Tenth Amendment "on Congress' power under the Commerce Clause." 469 U.S. at 556-557. In *Garcia*, the Court "reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" *Id.* at 546-547. The *Garcia* Court held

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[2] When *Wyoming* was decided, the ADEA permitted "an employer * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the] Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * * [or] shall require or permit the involuntary retirement of any individual because of the age of such individual." See 460 U.S. at 242 n.16 (quoting 29 U.S.C. 623(f)(2)). The EEOC construed that proviso to allow an employer to reduce "benefit levels for older workers * * * to the extent necessary to achieve approximate equivalency in cost for older and younger workers." 29 C.F.R. 1625.10(a)(1). This Court invalidated that regulatory interpretation in *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989). Shortly thereafter, Congress amended the ADEA to permit an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i).

that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." *Id.* at 556.

As the court of appeals below recognized, "*Garcia* established a far less stringent standard than that articulated in *National League of Cities* to determine whether federal legislation under the Commerce Clause impairs [S]tate sovereignty under the Tenth Amendment." Pet. App. 15a. Thus, given that the Court in *Wyoming* upheld the constitutionality of Congress' extension of the ADEA to state employers under the more sensitive Tenth Amendment analysis required by *National League of Cities*, this Court's subsequent adoption of a standard affording greater "respect for the reach of congressional power within the federal system," *Garcia*, 469 U.S. at 557, only "reinforce[s] the Court's determination in *Wyoming* that Congress is constitutionally authorized to require [S]tate employers to abide by the ADEA." Pet. App. 15a.

Petitioners fail to cite *Garcia*, and suggest no reason why claims similar to those rejected in *Wyoming* do not fail, *a fortiorari*, in light of *Garcia*'s replacement of *National League of Cities*. Cf. *South Carolina* v. *Baker*, 485 U.S. 505, 512-513 (1988) (rejecting Tenth Amendment challenge to federal registration requirements for state-issued bonds, and observing "that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless"). Instead, petitioners point to the legislative history of the Employee Retirement Income Security Act of 1974 (ERISA), and argue that the "same compelling con-

cerns of Federalism" that led Congress to exclude state pension plans from ERISA coverage, see 29 U.S.C. 1003(b)(1), barred Congress from requiring state employers to refrain from age discrimination in employee retirement plans. Pet. 17-18.

However, the statutory history of the ADEA demonstrates that Congress considered and represented the interests of the States in prohibiting public and private employers from discriminating against older workers, just as it did in enacting ERISA. Congress simply struck a different balance. In extending the ADEA to public employers, for example, Congress excluded from statutory protection elected officials and appointed policymakers at the state and local levels. See 29 U.S.C. 630(f). Moreover, when Congress amended the ADEA to clarify that the prohibition against unlawful age discrimination applies to all employee benefit plans, it provided an extended two-year period for States to bring an employee benefit plan that "may be modified only through a change in applicable State or local law" into compliance with federal law. See 29 U.S.C. 623 note.

Petitioners argue (Pet. 5-6) that "the determination of the eligibility for, and calculation of, State retirement benefits is an attribute of State Sovereignty" that lies beyond the constitutional bounds of "federal intrusion." That claim fails under the approach taken by the Court in *Garcia*, which rejected a Tenth Amendment analysis that sought "to articulate affirmative limits on the Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty." 469 U.S. at 556. But in any event, as discussed above, *Wyoming* establishes that, even under the more vigorous Tenth Amendment analysis of *National League of Cities*, petitioners could not demonstrate that

the ADEA's application to the State's employee retirement plan impermissibly intrudes on state sovereignty.

In addition, as amended, the ADEA permits an employer "to observe the terms of a bona fide employee benefit plan * * * where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." 29 U.S.C. 623(f)(2)(B)(i). Certainly, the degree of federal regulation of state interests in requiring compliance with the ADEA's "equal cost, equal benefit rule" is no greater than that which the Court permitted in *Wyoming*. See 460 U.S. at 242 & n.17.[3]

2. The court of appeals' decision in this case is also consistent with this Court's subsequent Tenth Amendment decisions. While ignoring *Garcia* and the clear import of *Wyoming*, petitioners rely on *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). Pet. 6-14. This Court has made clear, however, that the Tenth Amendment principles applied in those decisions do not govern challenges to Congress's authority "to subject state governments to generally applicable laws," such as the ADEA, by "subject[ing] a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160.

In *New York*, the Court considered a Tenth Amendment challenge to incentives provided in the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. 2021b *et seq.*, "to encourage the States to comply with their statutory obligation to provide for the

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[3] In addition, as the court of appeals noted below, petitioners provided "no evidence" to support the assertion that the alleged "intrusion into state sovereignty" in this case is more substantial than that involved in *Wyoming*. Pet. App. 15a.

disposal of waste generated within their borders." 505 U.S. at 152. New York argued that Congress had impermissibly commandeered the States to regulate in this field. Before addressing that claim, the Court distinguished its "recent cases interpreting the Tenth Amendment," which "concerned the authority of Congress to subject state governments to generally applicable laws," *id.* at 160 (citing, *inter alia*, *National League of Cities*, *Garcia*, *Wyoming*, and *Baker*), and stated that "[t]his litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." Instead, the Court stated, *New York* "concern[ed] the circumstances under which Congress may use the States as implements of regulation." *Id.* at 160, 161.

Printz v. *United States*, 521 U.S. 898 (1997), is to the same effect. In that case, the Court applied the principles discussed in *New York* to invalidate an interim provision of the Brady Act requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers. Citing the holding in *New York* that "Congress cannot compel the States to enact or enforce a federal regulatory program," the Court in *Printz* held that "Congress cannot circumvent that prohibition by conscripting the States' officers directly." *Id.* at 935. *New York* and *Printz* thus establish that, under the Tenth Amendment, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Ibid.*

Drawing from *New York* and *Printz*, the court of appeals held that petitioners *are* entitled to Tenth Amendment immunity from any order requiring the State "to enact permanent legislation." Pet. App. 20a-21a. But *New York* and *Printz* provide no support for petitioners' claim that they are entitled to across-the-board immunity in this enforcement action because the ADEA touches on an area of state or local concern.

In *Reno* v. *Condon*, 528 U.S. 141 (2000), on which petitioners also rely (Pet. 12), this Court reaffirmed the distinction, for purposes of Tenth Amendment analysis, between a generally applicable federal law that regulates state activities in the same manner as private conduct, and a law designed to control or influence the manner in which States regulate private parties. *Condon* upheld the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721 *et seq.*, which "establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent." 528 U.S. at 144. The Court rejected the argument that the DPPA impermissibly "commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes * * * and because state officials had to devote substantial effort" to comply with the federal requirements. *Id.* at 150. As the Court explained: "Such 'commandeering' is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Id.* at 150-151.

Like the generally applicable federal law upheld in *Condon*, and unlike the unique statutory provisions invalidated in *New York* and *Printz*, the ADEA does not attempt to control or influence the manner in which petitioner Commonwealth of Kentucky regulates private parties. The ADEA neither requires Kentucky, in its sovereign capacity, to regulate the conduct of private individuals or employers, nor commands Kentucky officials to enforce federal statutes regulating private conduct. Nor does the ADEA require Kentucky's legislature to enact specific laws or regulations, or even direct Kentucky to provide particular employment benefits to state employees. Rather, the ADEA regulates state employers in the same manner as private employers, by proscribing age-based discrimination against older workers in the terms and conditions of employment, including the provision of pension benefits. The ADEA in no way obligates a State to enact a disability retirement plan for its employees. But if a State chooses to do so, then it is subject to the same basic anti-discrimination principles under the ADEA that govern private employers who operate such plans.

To the extent that Kentucky is required, as a consequence of the EEOC's enforcement action, to decline to enforce or alter statutory provisions or policies that are inconsistent with the ADEA, this remedy does not unconstitutionally "commandeer" the State's legislative process in a manner comparable to the provisions invalidated in *New York* and *Printz*. Moreover, as the Court recognized in *Baker*, 485 U.S. at 514-515, and unanimously reaffirmed in *Condon*, 528 U.S. at 150-151, that type of relief is "an inevitable consequence of regulating a state activity." That the ADEA requires Kentucky, in operating any retirement plans for state

employees that it chooses to enact, to "take administrative [or] legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Condon*, 528 U.S. at 150, 151.

3. As presented to this Court, petitioners' Tenth Amendment claim also suffers from the uncertainties stemming from the current interlocutory posture of this litigation. For instance, petitioners argue (Pet. 10) that the court of appeals erred "in viewing the monetary damage award and affirmative relief sought in the EEOC Complaint in the abstract," and claim that the court of appeals also "should have considered what steps would be required to be taken by the Commonwealth in order to comply with a damage award and an injunction, and to avoid any further damage awards, by adopting specified policies, practices and programs." The need for such speculation, however, undermines rather than reinforces the case for review of petitioners' Tenth Amendment claim at this interlocutory stage.

The court of appeals held below that petitioners are entitled to Tenth Amendment immunity from any court mandate requiring the State "to enact permanent legislation." Pet. App. 21a. Any consideration of petitioners' claims that they are entitled to Tenth Amendment immunity from relief that would require the State to alter its program or practices short of such legislation would be premature, and unnecessary, until a court were able to evaluate those claims in light of a finding of liability on petitioners' part and a specific order granting relief. Only then would the Court be able to evaluate petitioners' claim in concrete terms against the Tenth Amendment principles established by this Court's precedents, the parties' arguments as to the

specific steps that petitioners in fact would be required to take to comply with that order, and the court's decision in this case barring relief that would require the enactment of permanent legislation.

4. The interlocutory nature of this case poses another, and even more serious, hurdle for petitioners. The court of appeals lacked jurisdiction to review the denial of petitioners' motion to dismiss on Tenth Amendment grounds because that interlocutory ruling is neither within the "small class" of decisions subject to immediate appeal under the "collateral order" doctrine, see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), nor within the scope of any authority the court had to exercise "pendent appellate jurisdiction." See *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 40 (1995). That provides an independent reason to deny the petition.

The denial of a motion to dismiss grounded on the availability of Eleventh Amendment immunity from suit is subject to immediate interlocutory appeal under the collateral order doctrine. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The Eleventh Amendment confers on a non-consenting State the "privilege not to be sued" by a private party. *Id.* at 146 n.5. In the Eleventh Amendment context, this Court therefore applies the "same rationale" that justifies allowing an immediate appeal from the denial of a government official's claim of absolute or qualified immunity: "The entitlement is an *immunity from suit*, rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 144 (quoting *Mitchell* v. *Forsyth*, 457 U.S. 511, 526 (1985)).

The Tenth Amendment does not readily lend itself to that rationale. The "Tenth Amendment limits * * * Congress' authority to regulate state activities," *Baker*, 485 U.S. at 512, and thus embodies a restriction on federal statutory and regulatory power rather than an immunity from suit. In addition, unlike the State's Eleventh Amendment "privilege not to be sued," which "is for the most part lost as litigation proceeds past motion practice," *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 145, petitioners' Tenth Amendment arguments can be fully vindicated on appeal from a final judgment.

Petitioners' assertion that the Tenth Amendment insulates their pension plan from federal regulation pursuant to the ADEA affords them a defense to liability under the ADEA, but not immunity from suit by the federal government to enforce that statute. Like an argument that a federal statute violates the First Amendment, an argument that Congress ran afoul of the Tenth Amendment can be vindicated on final appeal. Because "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment," the denial of petitioners' motion to dismiss on Tenth Amendment grounds "was not an appealable collateral order." *Swint*, 514 U.S. at 43.[4]

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[4] In the court of appeals, respondent noted its objection to interlocutory appellate jurisdiction over petitioners' Tenth Amendment claim, but acknowledged that the court of appeals had recently exercised "pendent appellate jurisdiction" over an interlocutory appeal raising simultaneous claims of Tenth and Eleventh Amendment immunity. See *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.), cert. denied, 531 U.S. 816 (2000). In response, petitioners asserted that "the State's Tenth and Eleventh Amendment claims are inextricably intertwined in these appeals to form a unified attack against the EEOC Complaint,"

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and thus conferred appellate jurisdiction to review both claims of immunity. See KRS Reply Br. 2. The court of appeals did not address that argument. Now that petitioners have abandoned their Eleventh Amendment immunity claim, they are hard-pressed to argue that their Tenth and Eleventh Amendment claims are "inextricably intertwined" for purposes of conferring interlocutory appellate jurisdiction over their Tenth Amendment claim.